APPENDIX A

U.S. TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

WASHINGTON, D.C. 20224

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Mr. Duane W. Krohnke
Office of the Editor
The University of Chicago Law Review
Chicago 37, Illinois

In re: Application of Massiah and Escobedo to Income Tax Investigations

Dear Mr. Krohnke:

This is in further regard to your letters of March 29, 1965 to Mr. G. d'Andelot Belin, General Counsel of the Treasury Department, and Mr. Arnold Sagalyn, Director, Office of Law Enforcement Coordination, regarding the Massiah and Escobedo cases. Specifically, you inquire as to their effect on the investigative techniques of law enforcement agencies of the Treasury Department. Our remarks are limited to the manner in which the cases in question affect the investigative activities of the Internal Revenue Service in the income tax area.

In Massiah v. United States, 377 U.S. 201 (1964), incriminating statements made by the petitioner and picked up on a hidden radio were deemed inadmissible as evidence. The Court relied on the Sixth Amendment guarantee of right to counsel and did not reach the question of petitioner's Fourth Amendment rights.

Petitioner was free on bail after being indicted for violation of the narcotics law. The incriminating statements were made in the

automobile of a confederate who, unknown to the petitioner, had agreed to let narcotics agents install a radio transmitter in the vehicle. The statements were overheard by an agent and were admitted in evidence over the objections of petitioner. The court of appeals affirmed the conviction.

The Supreme Court reversed, and in so doing stressed its decision of Spano v. New York, 360 U.S. 315 (1959), wherein a state court conviction was overturned because of the admission of a confession obtained after the defendant's indictment. Four concurring Justices had pointed out in Spano that "the Constitution required reversal of the conviction upon the sole and specific ground that the confession had been deliberately elicited by the police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer's help." In the present case, the Court felt that the use of the incriminating statements denied petitioner the basic protection of the Sixth Amendment "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." The Court stressed the fact that it was not ruling on the propriety of continuing surveillance of petitioner while he was free on bail, but only that his own incriminating statements, obtained under these circumstances, could not be used against him.

In Escobedo v. Illinois, 378 U.S. 478 (1964), the failure to honor Escobedo's request to consult

with his lawyer during the course of an investigation was held to be a denial of the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments.

When Escobedo was interrogated by the police about the murder of his brother-in-law the police refused both his repeated requests to confer with his attorney and his attorney's attempts to see him. He admitted implication in the murder, was convicted, and the Illinois Supreme Court affirmed the admission of his statement.

The Supreme Court reversed and remanded, holding that it made no difference that the interrogation was conducted before Escobedo was formally indicted. It was the Court's view that when Escobedo requested, and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of "an unsolved crime." The Court pointed out that the police had not informed him of his absolute right to remain silent, and declared that the "guiding hand of counsel" was essential to advise him of his rights.

In sum, the Court held that when the process of criminal law enforcement shifts from investigatory to accusatory, when its focus is on the accused and its purpose is to elicit a confession, our adversary system begins to operate and the accused must be permitted to consult his lawyer.

As a predicate for discussing whether or not these cases have any applicability to the

income tax area, an outline of the general investigative procedures of the Internal Revenue Service is in order.

The first contact with a taxpayer is often made by an Internal Revenue Agent whose duties involve the auditing of returns to determine the correct tax liability. If he finds indications of fraud, he refers the matter to his superiors who, if the facts justify such action, contact the Intelligence Division. A special agent may be assigned to look into the matter. He may informally interview the taxpayer (on a voluntary basis), contact third parties, and examine records. There may be other contacts with the taxpayer. The taxpayer is always free to consult or call in his attorney.

If the subsequent investigation develops evidence to warrant an Intelligence Division finding that a crime was probably committed and that the taxpayer probably committed it, the taxpayer is usually afforded the opportunity to appear with his attorney at a formal conference. Having completed his investigation, a special agent submits a report wherein he analyzes available data and makes a recommendation. If he has recommended prosecution and the Assistant Regional Commissioner (Intelligence) agrees, the matter is forwarded to one of our Regional Counsel.

At this point the case is accorded its first plenary legal review to determine if the evidence is sufficient to establish guilt beyond

a reasonable doubt and whether there is a reasonable probability of conviction. The taxpayer is usually offered a conference, whereat he is apprised of his rights under the Fifth and Sixth Amendments, advised of the Intelligence Division recommendation and the general procedure for reviewing criminal tax cases, and afforded the opportunity to make a statement.

If Regional Counsel concludes that the case should be prosecuted, he makes an appropriate recommendation and forwards it to the Department of Justice. Thereafter, until final disposition of the criminal case, the Internal Revenue Service generally takes no further investigatory action except with the approval of the Department of Justice.

For further information as to the aforestated investigative and review procedures see Kostelanetz and Bender, Criminal Aspects of Tax Fraud Cases (August 1957); Balter, Tax Fraud and Evasion (3rd Ed., 1963); Schmidt, Legal and Accounting Handbook of Federal Tax Fraud (1963).

With this background, it becomes clear that Massiah and Escobedo have no across-the-board applicability in the area of criminal income tax investigations.

In view of the fact that the incriminating statements in Massiah were secured after indictment, that decision should have virtually no effect on the investigative techniques of our agents in the income tax area. In contrast to

the factual setting of Massiah, it is extremely unlikely that a special agent in an income tax investigation will be confronted with a situation where one member of a criminal conspiracy has been indicted and thereafter he must perform further investigation to develop evidence relative to unknown individuals.

In regard to Escobedo, we note that the Court, in determining that Escobedo's Constitutional rights were violated, commented:

> "The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference. * * * It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." (Emphasis added.) (pp. 485, 486.)

In reversing the conviction, the Court stated:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the

> police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution * * *." (Pp. 490-491.)

The Supreme Court thus predicated its decision upon the presence of certain specific circumstances. Our reaction to these factors is that: (1) the circumstance of a known crime needing only the perpetrator's identity is simply not present in tax investigations; (2) the accusatory stage is reached in a criminal tax case only at the moment of arrest or upon the return of an indictment or filing of an information; (3) a taxpayer during the course of an inquiry into his tax affairs is not, barring an arrest, physically within the power of the special agent, nor is he, even if interrogated under the authority of a summons, inevitably under coercive pressure unless he knows of his right to remain silent or to have the assistance of counsel; and (4) a request to consult with an attorney is never denied by the Internal Revenue Service--to the contrary, and although there is no requirement to do so, a taxpayer is specifically advised at various stages during the processing of a criminal tax case of such right.

Undoubtedly the Escobedo and Massiah decisions may cause some disagreement both as to their precise scope and their effect on present criminal investigatory procedures. See 78 Harv. L. Rev.

217 (1964); 26 U. Pitt. L. Rev. 151 (October 1964); 33 U. Cin. L. Rev. 523 (Fall 1964); 14 DePaul L. Rev. 187 (Autumn-Winter 1964); 3 Duquesne U. L. Rev. 102 (Fall 1964); 48 Marq. L. Rev. 247 (Fall 1964); 38 So. Calif. L. Rev. 156 (1965); 9 St. Louis U. L. J. 281 (Winter 1964).

In sum, and in view of the investigative procedures described herein, we do not believe that the decisions are applicable in the income tax area. Accordingly, our procedures have not been changed nor do we expect to encounter any administrative difficulty in applying the rationale of said cases.

Inasmuch as the manuals used by the Internal Revenue Service are for intra-agency use only and are not available for public perusal we regret that we are unable to furnish specific citations thereto. However, we have referenced for your consideration several books wherein is discussed the role of a special agent in criminal tax investigations.

It is hoped that the foregoing will be of assistance.

Very truly yours,

Mitchell Rogovin

MITCHELL ROGOWIN
Chief Counsel

We would be interested in receiving a copy of your law review comment upon publication

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